

**Objection to the Approval of Solid Waste Facility Major Modification and Renewal Permit
for Clifty Creek Ash and FGD By-product Landfill, Restricted Waste Site Type 1, FP 39-04
Indiana-Kentucky Electric Corporation
Jefferson County, Indiana
2010 OEA 141, (08-S-J-4106)**

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 141 cite this as
Indiana-Kentucky Electric Corporation, 2010 OEA 141.

TOPICS:

dismissal
landfill
solid waste
ash
deference
collateral estoppel
de novo

PRESIDING JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Denise Walker, Esq.
Petitioners: Jerome Polk, Esq.; Polk & Associates
Permittee: Guinn Doyle, Esq., Anthony Sullivan, Esq., David Heger, Esq.;
Barnes & Thornburg, LLP

ORDER ISSUED:

September 22, 2010

INDEX CATERGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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2. On December 26, 2002, Citizens Action Coalition of Indiana, Inc. (CAC); Hoosier Environmental Council, Inc. (HEC); Save the Valley, Inc. (STV) (“Citizens Groups”) filed a Petition for Administrative Review (“Initial Petition”) of the approval of renewal of Permit No. FP-39-4 for the Clifty Creek Generating Station in Jefferson County, Indiana.
3. On February 7, 2003, Indiana-Kentucky Electric Corporation (“IKEC”) filed its first Motion to Dismiss and brief in support alleging the Initial Petition did not meet the basic statutory or regulatory requirements of I.C. § 13-15-6-2 and 315 IAC 1-3-2 to invoke the jurisdiction of the OEA.
4. As directed by the OEA in a Case Management Order issued on February 12, 2003 and in Amended Case Management Orders issued on March 14 and 17, 2003, Citizens Groups filed an Amended Petition for Administrative Review (“Amended Petition”) on March 31, 2003, to bring their petition into compliance with the specific pleading requirements in I.C. § 13-15-6-2.
5. On March 3, 2003, IKEC filed a second Motion to Dismiss and brief in support alleging the Initial Petition did not meet statutory requirements to invoke the jurisdiction of the OEA because an organization’s allegation of its members’ injury, as opposed to its own, is insufficient to confer standing under controlling decisions of the Indiana Courts.
6. On June 23, 2003, the OEA issued its Findings of Fact, Conclusions of Law, and Order Denying Motions to Dismiss (“OEA Order”). In that order, the OEA denied IKEC’s February 7, 2003 Motion to Dismiss, concluding that despite Citizens Groups’ failure to meet the requirements in I.C. § 13-15-6-2 with their Initial Petition, Citizens Groups established subject matter jurisdiction in their initial pleading and their Amended Petition met the requirements of I.C. § 13-15-6-2. The OEA also denied IKEC’s March 3, 2003 Motion to Dismiss, concluding that Citizens Groups had alleged facts in their Amended Petition sufficient to confer associational standing to obtain administrative review of the permit renewal under I.C. § 4-21.5-3, the Administrative Orders and Procedures Act (“AOPA”).
7. On July 3, 2003, IKEC sought judicial review of the determination in the OEA Order with respect to its March 3, 2003 Motion to Dismiss.
8. On October 27, 2003, the Marion Superior Court concluded that it had subject matter jurisdiction and granted IKEC a declaratory judgment that the OEA lacked jurisdiction over this particular case because Indiana did not recognize associational standing for purposes of satisfying the “aggrieved or adversely affected” standard for administrative review under AOPA.

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9. However, on January 11, 2005, the Court of Appeals reversed the Marion Superior Court, deciding that Indiana recognized associational standing for purposes of satisfying the “aggrieved or adversely affected” standard for administrative review under AOPA and that the OEA had jurisdiction over the particular case, thus affirming the OEA Order of June 23, 2003. *See Save the Valley, Inc. v. Indiana-Kentucky Elec. Co.*, 820 N.E.2d 677 (Ind. Ct. App. 2005) (hereinafter, “*Save the Valley*”).
10. On March 31, 2005, the Court of Appeals affirmed this decision on rehearing, *see* 824 N.E.2d 776 (Ind. Ct. App. 2005), and, on August 11, 2005, the Supreme Court denied transfer. The case was remanded to the OEA.
11. IKEC filed a Motion to Dismiss the Petition for Review and a Motion for Summary Judgment on October 14, 2005 on the grounds that Citizens Groups are without standing to secure review of IDEM’s December 2002 renewal of IKEC’s Permit because none of the named members of Citizens Groups have standing to challenge the Permit renewal in their own right. IKEC also moved for summary judgment on Citizens Groups’ claim in their Amended Petition that IDEM abused its discretion in renewing the Permit without first providing notice and an opportunity for public comment and hearing.
12. IKEC filed a Motion to Reconsider OEA’s Order of June 23, 2003 in Light of New Authority and to Dismiss the Petition for Review on November 4, 2005.
13. On March 24, 2006, the ELJ issued Findings of Fact, Conclusions of Law and Order Denying Motion to Reconsider and Motion to Dismiss, finding that *Save the Valley* was binding on this case.
14. On March 23, 2007, the ELJ issued Findings of Fact, Conclusions of Law and Order partially denying and partially granting IKEC’s Motion for Summary Judgment. The ELJ found that the Citizens Groups were aggrieved and adversely affected by the issuance of the Permit. The ELJ further found that a genuine issue of fact existed as to whether ash waste constituents from the Landfill could potentially impact ground water or surface water. Summary judgment was granted in favor of IKEC on the issue of whether there was sufficient evidence to substantiate the Citizen Groups’ contentions the Permit failed to adequately address fugitive dust. Further, the Court granted summary judgment in IKEC’s favor regarding the Citizen Groups’ allegations that IDEM had erred in failing to provide a public hearing before issuance of the Permit.
15. IKEC filed another Motion for Summary Judgment on November 2, 2007. The Court denied this motion on March 26, 2008 finding that the IDEM had the authority to modify the permit when it was renewed regardless of IKEC’s compliance status.

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16. IKEC then filed a Motion for Partial Summary Judgment on Surface Water Issues on May 7, 2007. On October 6, 2008, the Court granted the motion for summary judgment finding that the Citizen Groups had failed to present sufficient evidence to sustain their allegations that the Landfill was a source of surface water contamination. This included determinations that NPDES-permitted discharges and minor seepage from the Landfill are lawful and non-injurious.
17. IKEC filed Indiana Kentucky Electric Corporation's Motion for Partial Summary Judgment on All Issues Relating to Water Supplied by the City of Madison Water Department on August 31, 2007.
18. On November 8, 2007, IKEC filed a Motion for Partial Summary Judgment on Kent Water Company Issues. On March 6, 2009, the Court denied IKEC's motion on the grounds that the Citizens Groups had presented sufficient evidence to create an issue of fact as to whether Kent Water Company well fields may be affected by contamination migrating from the Landfill.
19. On September 26, 2006, IKEC filed Indiana-Kentucky Electric Corporation's Motion to Reconsider This Court's Order of March 24, 2006 In Light of New Authority and to Correct Oversights. On April 22, 2008, IKEC filed Indiana-Kentucky Electric Corporation's Motion to Reconsider this Court's Order of March 26, 2008. On August 28, 2008, the Court denied the Motions for Reconsideration.
20. On February 19, 2009, the IDEM filed its Motion to Dismiss as Moot or Consolidate. The Court denied the motion to dismiss, but granted the motion to consolidate this cause with Cause No. 08-S-J-4106 on June 5, 2009.
21. On August 24, 2009, the Court granted IKEC's Motion for Partial Summary Judgment on All Issues Relating to Water Supplied by the City of Madison Water Department.
22. On May 6, 2009, IKEC filed a Motion for Summary Judgment on All Remaining Issues (Which Relate to Possible Future Contamination of Drinking Water Supplied by Kent Water Company and City of Madison Water Department) in Cause No. 02-S-J-2989. On March 17, 2010, the ELJ granted summary judgment in favor of IKEC and entered Findings of Fact, Conclusions of Law and Final Order.¹

Cause No. 08-S-J-4106

1. On April 15, 2008, the IDEM renewed the Permit at issue in this case. The renewal included approval of major modifications of the Landfill.

¹ IKEC filed a Petition for Judicial Review of this cause.

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2. On May 8, 2008, the Citizen Groups filed their Petition for Review. This cause was assigned Cause Number 08-S-J-4106.
3. On May 9, 2008, Indiana-Kentucky Electric Corporation (“IKEC”) filed its Petition for Leave to Intervene as a Party pursuant to I.C. § 4-21.5-3-21. On May 13, 2008, the OEA granted IKEC’s Petition.
4. On May 16, 2008, IKEC filed its Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted.
5. On May 27, 2008, IDEM filed its Motion to Dismiss. The basis of IDEM’s motion was that the Petitioners failed to timely file their Petition for Review. On the ELJ’s order, briefing of IKEC’s Motion to Dismiss was suspended pending a decision on IDEM’s Motion to Dismiss. On September 5, 2008, the ELJ issued its order denying IDEM’s Motion to Dismiss.
6. Briefing of IKEC’s Motion to Dismiss resumed and concluded on December 11, 2008. Oral argument was heard on January 27, 2009. The ELJ issued an order on March 18, 2009 denying IKEC’s Motion to Dismiss.
7. Thereafter, on April 28, 2009, IKEC filed its Motion for Reconsideration of This Court’s Order of March 18, 2009 Denying IKEC’s Motion to Dismiss the Petition for Review Filed May 8, 2008, and For Initial Consideration of Dispositive Issues Raised by IKEC’s Motion to Dismiss That This Court’s Order Failed to Address Even Though They Were Unopposed by Petitioners. This Motion for Reconsideration was denied on June 5, 2009. As part of this order, the ELJ modified its March 18, 2009 Order. The modification struck the paragraphs on the March 18, 2009 Order holding that collateral estoppel applied. The reason was that the decision in *Save the Valley, Inc. v. Indiana-Kentucky Electric Corp.*, 820 N.E.2d 677 (Ind. Ct. App. 2005), *aff’d on reh’g*, 824 N.E.2d 776 (2005), *trans denied* (“*Save the Valley*”) was not a final order. The appellate court reversed the trial court and remanded the case back to the OEA.
8. As part of the Final Order issued on March 17, 2010 in Cause No. 02-S-J-2989, the ELJ separated Cause No. 08-S-J-4106 from 02-S-J-2989.
9. On May 15, 2009, IKEC filed its Motion for Summary Judgment. Briefing was concluded on July 23, 2009.
10. On November 19, 2009, IKEC filed its Motion to Dismiss. Briefing was concluded on December 30, 2009. IKEC filed its Citation of Additional Authority on July 14, 2010.

FINDINGS OF FACT

1. All paragraphs of Statement of the Case are incorporated as Findings of Fact.

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2. The Petition for Review sets out two issues. These are: (1) whether the modification and/or renewal of the permit was contrary to law under any terms and conditions in view of the circumstances extant that the Clifty Creek Station Site at the time of renewal with respect to the contamination of ground and surface water; and (2) whether modification and/or renewal of the permit was contrary to law under the approved terms and conditions in view of the circumstances extant at the Clifty Creek Station Site at the time of modification and renewal with respect to the contamination of ground and surface water.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, I.C. § 4-21.5-3-27(d). Deference to the agency’s initial determination is not allowed. *Id.* “*De novo* review” means that, “all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).
4. Collateral estoppel bars the subsequent litigation of a fact or issue which was adjudicated in previous litigation if the same fact or issue is presented in a subsequent lawsuit. *Fitz v. Rust-Oleum Corp.*, 883 N.E.2d 1177, 1182 (Ind. App. 2008). The former adjudication will be conclusive in the subsequent action even if the two actions are on different claims. *Id.* However the former adjudication will be conclusive only as to those issues which were actually litigated and determined therein. *Id.* A two-part analysis determines whether collateral estoppel should be employed in a particular case: (1) whether the party against whom the former adjudication is asserted had a full and fair opportunity to litigate the issue and (2) whether it would be otherwise unfair under the circumstances to permit the use of issue preclusion in the current action. *Id.* at 1182-83.
5. The Court has determined in Cause No. 02-S-J-2989 that the Citizen Groups failed to present sufficient evidence to prove that a genuine issue of fact existed regarding whether the Permit adequately addressed contamination of surface and/or ground water.

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6. The order issued in Cause No. 02-S-J-2989 on March 17, 2010 is a final order, because the OEA is the ultimate authority for the IDEM and it disposes of all remaining issues in this proceeding.
7. The Citizens Groups' had more than sufficient opportunity in Cause No. 02-S-J-2989 to litigate the issues raised in their Petition for Review. In the aftermath of the March 17, 2010 Final Order, they have not presented any additional or new evidence in support of their contentions that surface and/or ground water contamination is not adequately addressed by the Permit.
8. Given the extensive nature of these proceedings both in Cause No. 02-S-J-2989 and Cause No. 08-S-J-4106, it would not be unfair to apply collateral estoppel in this matter.
9. The Petition for Review raises the issue of whether the Permit is contrary to law with respect to ground and/or surface water contamination. These issues have been decided in IKEC's favor in Cause No. 02-S-J-2989. Collateral estoppel bars the re-litigation of those issues raised in Cause No. 08-S-J-4106 that were adjudicated in Cause No. 02-S-J-2989.

FINAL ORDER

AND THE COURT, being duly advised, hereby ORDERS, ADJUDGES AND DECREES that the Petition for Review is **DISMISSED**.

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served. This order disposes of this proceeding.

IT IS SO ORDERED this 22nd day of September, 2010 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge